TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 34, 67.

THE COLUMBIA WATER POWER COMPANY, PLAINTIFF IN ERROR,

vs.

THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

FILED MARCH 6, 1907.

(16,608.)

(16,508.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 729

THE COLUMBIA WATER POWER COMPANY, PLAINTIFF IN ERROR,

vs.

THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 8, 1897.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the chief justice and the associate justices of the supreme court of the State of South Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Columbia Water Power Company and The Columbia Electric Street Railway, Light and Power Company, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the
2 validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said The Columbia Water Power Company, as by its complaint appears, we, being willing that error, if any hath been, should be fully corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be
3 therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the ninth day of February, in the year of our Lord one thousand eight hundred and ninety-seven.

[Seal U. S. Circuit Court, District of So. Carolina.]

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

Allowed by—
HENRY McIVER,
Chief Justice of the Supreme Court of the State of South Carolina.

4 [Endorsed:] The Columbia Water Power Company, plaintiff in error, against The Columbia Electric Street Railway, Light and Power Company, defendant in error. Writ of error. Supreme court of South Carolina, clerk's office, Columbia, S. C. Filed 9 Feb., 1897, with copy. U. R. Brooks, clerk.

5 *Complaint.*

THE STATE OF SOUTH CAROLINA,
County of Richland.

In the Court of Common Pleas.

THE COLUMBIA WATER POWER CO., Plaintiff,
vs.
THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER CO., Defendant.

Complaint for relief.

The plaintiff above named, complaining of the defendant above named, respectfully shows to the court:

1. That it is a corporation duly organized and created under the laws of the State of South Carolina on the 5th day of October, 1891.

2. That the canal known as the Columbia canal commences at a point in Broad river above the city of Columbia, in the county of Richland, and passes through the city of Columbia near the western boundary and empties into the Congaree river just beyond the limits of said city, passing around the shoals and falls in said river, and when constructed and in use made a continuous communication by water between said two rivers; that the construction of said canal was commenced by the State of South Carolina as a public work some time during the year 1824, and for the purpose of said construction the State of South Carolina acquired and purchased, among other lands, certain lands within the limits of Columbia, through which said canal was to be carried and constructed, being

6 that strip of land when the said canal was cut bounded south by the southern line of Plain street, north by the southern line of Blanding street, and having for its western and eastern boundaries the Congaree river and the eastern bank of said canal; that upon the construction of the said canal from its northern to its southern terminus by the State of South Carolina the plaintiff is informed that it was used by the public for the purpose of transportation and navigation and was so continued to be used until the same was discontinued by the State, and all of said property, including the strip of land between the streets aforesaid, remained the property of the State of South Carolina and continued in its possession until the times hereinafter mentioned.

3. That on the 8th day of February, 1882, the General Assembly of the State of South Carolina, by an act entitled "An act to author-

ize the canal commission to transfer and deliver to the board of directors of the South Carolina penitentiary the property known as the 'Columbia canal,' with the lands held therewith, and its appurtenances, and to develope the same," authorized and directed the transfer and delivery to the board of directors of the South Carolina penitentiary the property known as the "Columbia canal," together with the lands held therewith, and all and singular the rights, members, and appurtenances thereto belonging which had been hitherto, prior to that time, acquired by the State, and in the said act the said board of directors were authorized and directed, in behalf of the State, to take possession of said property, with its appurtenances, and to enlarge and develope the same for the sake of public improvement contemplated in the construction of said
7 canal, and thereupon the said board of directors took possession of the said canal property and all the lands of the State of South Carolina held with the said canal and acquired for its use and purposes, and among the lands was that strip of land, heretofore mentioned, lying between the southern line of Plain street, on the south, and the southern line of Blanding street, on the north, and between the eastern bank of said canal and the Congaree river, on the west, including the bank of said river; and the board of directors thereupon proceeded with the work of enlarging and develpoing the said canal, and for that purpose took possession of and used the lands hereinbefore mentioned, and, by the aid of appropriations made by the said State of South Carolina for that purpose, expended large sums of money in construction and development of the said property; and, in pursuance of said work, the said board of directors did widen and enlarge the banks of said canal and were in full and exclusive possession of said strip of land, all of which was used and required in the development of said property, and said board of directors remained in possession of the same until the time hereinafter mentioned without let or hinderance or interference from any person whatsoever and without any claim or assertion of any right of any kind whatsoever by any person or corporation against their title, interest, or possession thereto.

4. The plaintiff further alleges that at the time herein next below mentioned the State of South Carolina, through the said board of directors of the State penitentiary, was in full possession of all lands lying between Gervais street, on the south, and *and* Blanding
8 street, on the north, and the line of the said canal, on the east, and more particularly in the possession of all that strip of land between the southern line of Plain street and the southern line of Blanding street and lying west of the State penitentiary, as before mentioned, and that said property had been acquired for the uses and purposes of the said canal and was held along therewith.

5. That the General Assembly of the State of South Carolina, on the 24th day of December, 1887, passed an act entitled "An act to incorporate the board of trustees of the Columbia canal, to transfer to the said board the Columbia canal, with the lands now held therewith, and its appurtenances, and to develope the same," and that by

section 1 of said act the said board of trustees of the South Carolina penitentiary were authorized, directed, and empowered to transfer, assign, and release to the board of trustees of the Columbia canal, thereinafter created and provided for, the property known as the Columbia canal, together with the lands then held therewith and acquired under the acts of the General Assembly of said State with reference thereto or otherwise, and upon such transfer, assignment, and release all the right, title, and interest of the State of South Carolina in and to the said canal, all and singular the rights, members, and appurtenances thereto belonging, and all the lands held therewith, from its source, at Bull's sluice, through its whole length to the point where it empties in the Congaree river, together with all the appurtenances thereto belonging, should vest in the said board of trustees for the use and benefit of the city of Columbia for the purposes in said act mentioned; and in pursuance of such act the board of
9 directors of the South Carolina penitentiary, on the 1st day of February, 1888, did transfer, assign, and release unto the said board of trustees of the Columbia canal, their successors and assigns, all the right, title, and interest of the State of South Carolina in and to the said Columbia canal and all the lands held therewith in the terms and words used in said section of the above-stated act, and that thereupon the board of trustees of the Columbia canal did take possession of the said canal, its embankments, structures and works, and all appurtenances, together with the land then held and acquired for the use and development and each and every particular right, title and interest, and possession held by said State of South Carolina, through the said board of directors of the South Carolina penitentiary, in and to each and every piece, parcel, or tract of land theretofore used, claimed, or in possession of the same which was appurtenant to and used in connection with the said canal, and so remained in the uninterrupted, continuous, and exclusive possession thereof, without claim, demand, or any assertion of any right whatsoever upon the part of any one whatsoever in and to any interest herein until the date hereinafter mentioned.

6. That by section 21 of the above-mentioned act of the General Assembly, approved December 24th, 1887, the board of trustees was declared a body politic and corporate under the name "the board of trustees of the Columbia canal," and was authorized, among other things, to purchase, sell, or lease lands adjoining the canal for the purposes of the same, to sell or lease water power of the canal, subject to such rules and regulations as it should pre-
10 scribe, and exercise such powers given to it by said act of the General Assembly, and that by virtue of such act of incorporation and the powers conferred upon it the said board of trustees of the Columbia canal became entitled to the exclusive franchise and right to sell or lease water power developed by the said canal for the purposes of manufacturing and other industrial purposes and enterprises without let or hinderance whatsoever from any person or corporation or without the right upon the part of any person or corporation to interfere or interrupt in any manner the use of the said water power contained in the canal, save and except it should

provide a certain amount of horse-power of water power to certain persons and parties in said act nominated and mentioned; and in and by the rights and privileges transferred and given to said board of trustees to the Columbia canal no person or corporation had a right in any manner to divert, disturb, or impede or in any manner interfere with the flow of water in and down the said canal.

7. That by the 23d section of the last-mentioned act of the General Assembly of the State of South Carolina, as amended by the act approved December 24th, 1890, the board of trustees was given full power and authority, before the said canal should be developed, completed, and turned over to the city of Columbia, to sell, alienate, and transfer the same and all of its appurtenances, the lands held therewith, and all the rights and franchises conferred by said act on the board of trustees to any person or corporation, subject, however, to all the duties and liabilities imposed thereby, and subject to all the contracts, liabilities, and obligations made and
11 entered into by the said board prior to such sale and transfer, upon the approval and consent of nine members of the city council of the city of Columbia; and in *the* pursuance of such section the said board of trustees, before the completion of the canal and after the compliance with the requirements of said act authorizing such sale, did, on the 11th day of January, 1891, and while in the full and complete possession of all and singular the said property, rights, and franchises conveyed by the deed hereinabove mentioned, all of such property as had been in such possession, for valuable consideration, granted, bargained, sold, and released unto the said The Columbia Water Power Company, its successors and assigns forever, all that property situate, lying, and being in the State of South Carolina, in and near the city of Columbia, known as the "Columbia canal," and all the lands held therewith, acquired under the acts of General Assembly of said State with reference thereto or otherwise, from its source, at Bull's sl*u*ce, through its whole length to the point where it empties into the Congaree river, at or near the mouth of Rocky branch, including all lands, easements, rights of way, right of overflow, and appurtenances acquired by the board of trustees of the Columbia canal in the development and improvement of the said canal, together with all and singular the rights, members, hereditaments, and appurtenances to the said premises belonging or in anywise incident or appertaining, and together with all the rights and f*a*rnchises conferred by the acts of the General Assembly of the State of South Carolina on the said board of trustees of the Columbia canal; that immediately upon the execution
12 and delivery of the deed aforesaid the said Columbia Water Power Company went into possession of all and singular the property and lands last above described, and especially the lands and embankments lying between the south side of Plain street on the south and the south side of Blanding street on the north and between the walls of the South Carolina penitentiary on the east and a line extending southward therefrom and the Congaree river on the west, and so remain in possession of the same without let or

hindrance or interruption from any person whatsoever and without any claim or assertion of a right of any kind whatsoever upon the part of any one against the right, title, and possession of the plaintiff until the times hereinafter mentioned, and by virtue of such purchase and sale the plaintiff became entitled to and was vested with all the franchises, rights, privileges and immunities, and property conferred and given to said board of trustees in and by the said acts of the General Assembly of the State of South Carolina.

8. That the act of the General Assembly of the State of South Carolina approved December 24th, 1887, provided that upon the development and completion of the said canal the said board of trustees should furnish the State five hundred horse-power of water power at the State penitentiary, and the 23d section of said act, amended December 24th, 1890, provided that this duty should be imposed upon any person or corporation to whom the board of trustees should sell and transfer the said canal property; and this plaintiff alleges that on the — day of March, 1892, the development, enlargement, and completion of said canal was completed, and that on said day and ever since the plaintiff was and is ready to furnish the State with the five hundred horse-power of water power as required by the said act aforesaid.

13 9. That the defendant is and was at the time hereinafter mentioned a corporation duly chartered by an act of the General Assembly of the State of South Carolina approved December 16, 1891, under the name of the Columbia Electric Street Railway, Light and Power Company, hereinafter called the "electric company," said defendant company having been organized under the provisions of said act by the consolidation of the Columbia Electric Street and Suburban Railway and Electric Power Company and the Congaree Gas and Electric Company, the said consolidated company acquiring the property, franchises, and privileges of the Columbia Street Railway Company. The said Columbia Electric Street and Suburban Railway and Electric Power Company, a corporation *only* chartered and organized under an act of the General Assembly of the State of South Carolina approved December 24th, 1890, was authorized by its charter to build and construct through the streets of the city of Columbia a street railway and to operate their cars by electric power in the transportation of passengers and freights at such rates of speed as may be fixed. The said Congaree Gas and Electric Company, a corporation duly chartered and organized under an act of the General Assembly of said State approved the 24th day of December, 1887, *and* was authorized by said charter to construct and maintain a system of electric lighting — the city of Columbia, and at the time of said consolidation was in the possession and operation of a system of electric lighting; that the said Columbia Street Railway Company, a corporation organized under an act of the General Assembly of the State of South Carolina, was at the

14 time of said consolidation in the possession and operation of a street railway in the city of Columbia: that the defendant upon its organization and the consolidation aforesaid became possessed of the franchises and property of the last three mentioned

companies and continued in the operations thereof, and plaintiff alleges that the sole objects and purposes of the incorporation and organization of said company *was* for the profit and private gains connected therewith.

10. That on or about the — day of May, 1892, the board of directors of the South Carolina penitentiary, as officers and agents of the State, were informed and became aware of the readiness and ability of the plaintiff to furnish free of charge to the State of South Carolina the use of the five hundred horse-power of water power from the canal, in accordance with the terms of the act of the General Assembly of the State of South Carolina, and the plaintiff was informed by the said board and through the officers of the electric company that said company had been empowered and authorized by the said board of directors to build and construct a power-house, with forebay, flumes, and water wheels, for the purpose of utilizing the said five hundred horse-power so to be furnished to the State, and that it was the purpose of the said company to erect works under such authority sufficient to develop said five hundred horse-power of water power and to furnish to the State of South Carolina within the walls of the State penitentiary so much of the said power as had been agreed upon by and between the said board of directors of the penitentiary and the said company; that immediately thereupon this plaintiff gave due and proper notice to said board of directors and to the defendant acting under the authority of the said board of directors that it would object to the use of any of its lands or embankments on the west side of the canal by any person or corporation, except so much as would be necessary for the construction and erection of the said power-house, with forebay, flumes, and water wheels, for the furnishing of the five hundred horse-power of water power for the use of the State of South Carolina; but that the State of South Carolina or its agents, duly authorized, should have full liberty and right to enter upon and build such works upon the embankment of the canal necessary for actual use in furnishing and applying said water power, but such structure and works should be strictly confined to such portion of the embankment lands and property of the plaintiff as should be actually necessary for the State of South Carolina obtaining the use of the said five hundred horse-power of water power; and it further gave notice that the plaintiff would not in any manner or sense recognize, but, on the contrary, objected to and continued to object, and denied any right of the State to assign the said horse-power or any part thereof so to be furnished it to any person or corporation whatsoever to be used for private purposes outside of the walls of the penitentiary or in the public institutions of the State, or that it was under any liability or obligation or contract to permit, allow, or furnish water power from the said canal to be used by private corporations or persons conducting private enterprises for private profit or gain; and this plaintiff further charges and shows to the court that under said act authorizing the conveyance of said canal to the board of trustees of the Columbia canal, and other acts relating

thereto, that the use of said water power so to be furnished
16 to the State was intended to be and was solely provided for the purposes of use by the State itself in its public institutions, where the same was needful for supplying public wants and requirements, and was not intended, nor was it so provided or contracted for, for use by private individuals or corporations for private purposes, nor can the State, it is submitted, so divert as against the plaintiff the use of said water power for such private purposes, and *and* by means of such diversion bring itself into competition with the plaintiff in leasing water power for manufacturing or other industrial purposes, the exclusive right to do *so* which it had acquired and obtained by the purchase of said canal and franchises conferred upon such board of trustees of said canal under the acts above mention; nor can the same be assigned, either in whole or in part, by the State to private individuals or private corporations, nor was the said board of trustees or this plaintiff, its grantee, under any liability or obligation to furnish or supply any portion of said horse-power of water power for any other use or purpose than to the State in its said public institutions or for its public use.

11. That subsequent to such notification the defendant, acting as the duly authorized agent of the State, through the board of directors of the penitentiery, submitted specifications and plans for the construction and erection of a plant or works for obtaining or producing or making available the said water power, and the plaintiff did approve the same as not taking more or less embankment of land
than was necessary for the development or obtaining the five
17 hundred horse-power of water power for the use of the State, and did allow the defendant, as agent of the said State, to proceed with said work for the purpose of developing the said water power, as it was the intention, purpose, and desire of the plaintiff to perform all of the conditions, obligations, and terms of the said act of the General Assembly of the State of South Carolina authorizing the sale of said property, as it is its purpose and desire now to do; and, as plaintiff is informed, said work and construction was carried on and conducted on behalf of the State to its completion in accordance with the plans and specifications so submitted; that thereafter the said electric company, against the protests and objection of the plaintiff, proceeded to construct and place in said works machinery, &c., such a- generators, dynamos, &c., intended solely for the purpose of running its electric lights and street railway and furnishing various persons in the city of Columbia power for running various and divers industries; that this plaintiff has persistently and time and again insisted, protested, and given notice of objection to said use, and that proceedings would be taken as soon as practicable to prevent such misapplication by the said electric company, and the said company, notwithstanding such protests, continued and still continues to construct and place machinery in such power-house and in connection therewith for the purpose of running its electric street railway and other private purposes, and is now erecting and constructing and placing generators, dynamos, &c., in and upon said structures and property of this de-

fendant, to be used solely for the purpose of supplying power in lighting houses in no manner connected with the public in-
18 stitutions of the State or for their benefit or *or* use; and plaintiff is informed that this defendant proposes so to continue and so to act in defiance of the protests and objections of the plaintiff and in utter disregard of the rights of this plaintiff, and it is wholly remediless against such violation of its rights, except by the intervention of this court through its writ of injunction; that it is wholly without power to prevent the action of the defendant in the misapplication of said power in its use in running its said street railway and electric lights in the city of Columbia, owing to the duty of the plaintiff resting upon it of supplying and furnishing power for the use of the State in its penitentiary, as said power is furnished and made available at and by the same water wheel; that plaintiff cannot definitely ascertain the amount of water power that has been and is now being used so unlawfully by the defendant in its private business, but it alleges that unless said use be enjoined it will suffer irreparable injury and damage and its right and franchise to lease and sell water power for purposes of manufacturing and other industrial purposes will be materially affected and injured.

12. That the defendant, further conceiving and intending to injure this plaintiff in its franchises, privileges, and property by erecting, maintaining, and placing upon the embankments of its canal a steam-engine, with boilers, &c., for the purpose of generating and producing electric power as an auxiliary to its said works, and thereby increasing the amount of power that could be produced in said power station, and to furnish and supply the same to private persons and corporations for profit and gain, did on the — day of February, 1893, forcibly and wrongfully, and against the
19 objection and protest of the plaintiff, enter upon its said premises, to wit, upon its said western embankment of the canal, opposite the western walls of the State penitentiary, and at the southern end of the power-house hereinabove mentioned, and then and there did dig, excavate, and remove the earth, rock, and works composing the foundation of said embankment, to the great danger to the safety of the said canal and to the great damage to the said embankment, and did commence to erect the foundations for the steam-engine to be used in running generators, electric dynamos, &c., as above stated, and did erect walls, foundations, &c., for said engine-house, and has placed portions of machinery constituting said engine and is now engaged in the erection and placing of said engine and machinery in such structure so unlawfully erected and building a roof thereover, and has been and now is placing in such buildings in course of erection dynamos and other electric machinery, to be used in conjunction and in connection with said steam-engine in producing electric power, although the plaintiff aforesaid had protested and objected and still continues to protest and object to the unlawful and forcible entry upon the premises and the removal of its embankments and erection of machinery and buildings as aforesaid mentioned; but defendant, re-

gardless of such objections, warnings, &c., continues and is now placing and erecting such works and houses as aforesaid and will, unless restrained by this court, continue to so trespass upon and injure and build upon the property and premises of this plaintiff, to its irreparable damage and injury.

13. That on the — day of May, 1893, the defendant, against the objection, protest, and warning of the plaintiff, unlawfully,
20 forcibly, and in disregard of the rights of the plaintiff, entered upon its premises, to wit, the embankment of the canal and lands adjacept thereto, on the northern side of the said power-house, and has commenced to erect a boiler-house and coal-house, and that the same is now in the course of erection, and, plaintiff is informed, intends to proceed with such other and further structures and buildings, machinery, and appliances for use in the business of generating and applying electric power to run its lights and electric street railway in the said city of Columbia, and other gr-evious wrongs to the right of the plaintiff, and that the plaintiff is wholly without remedy to protect it in its rights against the forcible entry upon its premises and the erection of such buildings unless the same be enjoined and restrained by this court, and has suffered great damage and will suffer irreparable wrong in its rights, franchises, property, and privileges unless the defendant be restrained by this court.

14. Plaintiff further alleges that it has in every particular performed all of its obligations, conditions, and liabilities imposed upon it by the several acts of the General Assembly of the State of South Carolina and by all of its contracts, and stands ready and willing to continue and perform all such acts and things as by law or by contract it has oblicated itself to do; and it further shows to the court that it has informed, notified, and warned the defendant against the actions and things herein complained of, but that the defendant has, in utter disregard of every right of the plaintiff, forcibly and wrongfully trespassed upon its property, dug and excavated its embankment, placed obstructions upon it, inter-
21 ferring with the use and enjoyment of the franchises so granted it by the State, and has diverted and unlawfully used its right to the water power held and conveyed in said canal, and so continues to do.

15. The plaintiff further alleges that it is informed that the defendant has issued one hundred and fifty thousand dollars of bonds, secured by a mortgage upon all its property, and has included in said mortgage the works erected upon plaintiff's property and canal. Plaintiff further shows to the court, *to* the best information it can obtain, that if said bonds have been negotiated and passed into the hands of third persons such indebtedness far exceeds in amount the market value and price of all the property of said defendant, and is a prior lien to any claim or judgment that may be entered against it, and, should this plaintiff sue at law for damages against the defendant, such judgment would be worthless, as there would not be sufficient property after payment of said bonds to respond to the judgment so obtained.

16. That defendant therefore shows to the court that it is without remedy save in this honorable court against the wrongs and grievances hereinbefore complained of by the defendant, and that the damage done and about to be done to the said plaintiff is irreparable.

Wherefore the plaintiff prays the court for a temporary injunction restraining the defendant from using or attempting to use the five hundred horse-power of water power for the purpose of generating power to apply to the movements of its cars upon its
22 said street railway, for purposes of lighting its lamps or furnishing power motors, or any other private purposes, until a final hearing of this case, and on said final hearing said injunction to be perpetual.

Also for a temporary injunction to enjoin and restrain said defendant from further entering upon and erecting thereon structures, buildings, works, or machinery upon the aforesaid lands or premises of the plaintiff, or of further continuing the erection or building any structure or placing of any machinery upon said lands and premises of said plaintiff until a final hearing of this case, and that on such final hearing said injunction be made perpetual.

And that upon the hearing of this case an injunction be granted to this plaintiff, requiring the defendant to remove from its said premises all of said structures covering the steam-engine, boilers, and coal, and its said steam-engine and other machinery connected therewith.

And also that this court do assess such damages as has been done to this plaintiff in the premises, and that it may have judgment against the defendant for such amount.

And for such other and further relief as the circumstances of this case require and as to the court may seem meet and just.

ABNEY & THOMAS,
Attorneys for Plaintiff.

August 15th, 1893.

23 STATE OF SOUTH CAROLINA, }
County of Richland. }

Personally appeared before me, F. M. Rivers, who, being duly sworn, says that he is the superintendent of The Columbia Water Power Company, the plaintiff above named, and that each and every paragraph of the foregoing complaint is true of his own knowledge except paragraphs 2 and 15, which are stated on information and belief, and as to those paragraphs he believes it to be true. Deponent further says that the reason why the verification is not made by the plaintiff is that it is a corporation and has no directors resident in this State; that this deponent is, as above stated, an officer of the company, and that his knowledge is derived from having witnessed the transactions mentioned in the complaint and his communication with the defendant company concerning the matters and things in said complaint complained of; that the grounds of his belief are information communicated by reliable persons.

F. M. RIVERS.

Sworn to and subscribed before me this 15th day of August, 1893.

B. L. ABNEY,
Not. Pub., S. C.

Answer.

THE STATE OF SOUTH CAROLINA,
County of Richland.

THE COLUMBIA WATER POWER COMPANY, Plaintiff,
against
THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY, Defendant.

24 The defendant, by John T. Sloan, Jr., and Lyles & Muller, its attorneys, answering the complaint in the above-mentioned action:

I. Admits that, for the purpose of the construction of the Columbia canal, described in the second paragraph of the complaint, the State of South Carolina, through its board of public works, did acquire a strip of land lying within the boundaries described in said paragraph, said strip extending forty (40) feet in width each way from the centre line of said canal as at that time proposed and delineated upon the maps thereof, but it denies that the building and works and erections alleged to have been placed by this defendant upon the lands described in said paragraph at any point touched upon said strip of land, and it denies that the State of South Carolina or the board of directors of the South Carolina penitentiary or the board of trustees of the Columbia canal or the plaintiff itself ever acquired or held any part of said lot of land described in said paragraph of the complaint except the strip herein described in connection with or as belonging or appurtenant to the said Columbia canal; on the contrary, it alleges that the lot of land described in the said paragraph of the complaint was acquired by the State of South Carolina on the 18th day of October, 1866, under the provisions of an act entitled "An act to provide for the establishment of a penitentiary," approved the 21st day of September, A. D. 1866, whereby it was provided "that a commission, consisting of three persons, to be styled commissioners of the penitentiary, shall be appointed by his excellency the governor, whose duty it shall be to select and procure a proper site at some point, if practicable,

25 where water power may be available for manufacturing purposes within the enclosure on which to erect suitable penitentiary buildings with sufficient space to enlarge and improve the same from time to time as may be necessary," and that the premises upon which the buildings and works referred to in the complaint as having been erected by this defendant was the site of the workshops, water wheels, and other buildings used for the South Carolina penitentiary for the purposes of said institution; and this defendant denies that the plaintiff has any estate or interest in the premises

described in said second paragraph of the complaint except as above admitted.

II. It denies that the board of trustees of the Columbia canal ever became entitled to the exclusive franchise and right to sell or lease water power developed by the said canal for the purposes of manufacturing and other industrial purposes and enterprises, as alleged in paragraph 6 of the complaint, or that said board of trustees was ever possessed of the lot of land described in the complaint except as above admitted, and it denies that said board of trustees ever conveyed any portion of said land to the plaintiff herein except as above stated.

III. It denies that the five hundred horse-power of water power required to be furnished to the State of South Carolina was provided solely for the purpose of use by the State itself in its public institutions, and denies that it was not intended or provided for any use that the State of South Carolina might choose to put the same to. On the contrary, it alleges that by an act of the General Assembly, referred to in said complaint as constituting the board of trustees of the Columbia canal, it expressly provided that said
26 board should "furnish to the State, free of charge, on the line of the canal, five hundred horse-power of water power: Provided, that the right of the State to the said five hundred horse-power shall be absolute, and any mortgage, assignment, or other transfer of said canal by the board of trustees, or their assigns, shall always be subject to this right."

IV. It denies that this defendant ever intended to injure the plaintiff in its franchises, privileges, and property by the erection and maintenance of the engine, boilers, and other machinery referred to in the twelfth and thirteenth paragraphs of the complaint, and denies that said engine, boilers, and other machinery are located upon any land in which said plaintiff has any interest whatsoever. On the contrary, it alleges that said engine, boilers, and machinery were erected for the purpose of maintaining the power which the works so erected were calculated to develope from the use of the water power alleged in said complaint in case the said canal should be inadequate, on account of high water or any defect in said canal, to furnish the power required of it.

V. It denies that the issue of bonds by the defendant, referred to in the fifteenth paragraph of the complaint, was in excess of the reasonable and fair valuation of the property and franchise of this defendant covered by the mortgage securing said bonds. On the contrary, it charges that it believes that the allegations of the fifteenth paragraph of said complaint were made by the plaintiff maliciously and without any foundation whatsoever, not to effect any right that the plaintiff conceived itself to have in
27 the premises, but for the purpose of injuriously affecting this defendant in the legitimate transaction of its business and the management of its franchises and property.

VI. It alleges that the State of South Carolina, being seized and possessed in fee-simple of the lot or parcel of land described in the complaint, except the strip above described, and being entitled to

free and unrestricted use of the five hundred horse-power of water power referred to in the complaint, but being without means to conveniently develope the same by the board of directors of the South Carolina penitentiary, entered into a contract, dated 26th day of May, 1892, approved by the comptroller general of the State of South Carolina, with this defendant, whereby, among other things, it was stipulated that this defendant should erect upon the lands described in the complaint suitable work*d* and machinery for the development of the five hundred horse-power of water power so to be furnished to the State, as alleged in the complaint, and to furnish so much thereof as was conceived to be necessary for the purposes of the South Carolina penitentiary within the walls of that institution, and should be allowed to make use of the surplus power as the consideration for the erection of such works and machinery, which contract was thereafterwards ratified and approved by an act of the General Assembly of the State of South Carolina approved on the 24th day of December, 1892, and this defendant, under said contract, is entitled to the free and unrestricted use of the said five hundred horse-power of water power for the purposes contemplated by such contract.

JOHN T. SLOAN, JR.,
LYLES & MULLER,
Defendant's Attorneys.

28 STATE OF SOUTH CAROLINA, }
County of Richland. }

Personally appears J. Q. Marshall, who, being duly sworn, says that he is the president of the defendant corporation; that the foregoing answer is true of his own knowledge except as to those matters therein alleged on information and belief, the denials of the source of the title of the plaintiff being made by him upon information derived from the public statutes and records of the State of South Carolina.

J. Q. MARSHALL.

Sworn to and subscribed before me this 26th day of August, 1893.

WM. H. LYLES, [L. S.]
Notary Public.

Upon the pleadings being read O. W. Buch*nana*, Esqr., assistant attorney general of South Carolina, read the following suggestion, signed by D. A. Townsend, Esq., attorney general of South Carolina; articles of agreement between W. J. Talbert, superintendent of the South Carolina penitentiary, and the defendant, dated May 26th, 1892; deed of conveyance of realty from T. J. Rawls to the State of South Carolina, dated October 18th, 1866; and he further read A. A., September 21st, 1866, 13 Stat., 366; A. A., February 9th, 1882, 17 Stat., 873, and A. A., December 24th, 1892, 21 Stat., 94.

Suggestion.

THE STATE OF SOUTH CAROLINA,
Richland County.

In the Court of Common Pleas.

COLUMBIA WATER POWER COMPANY, Plaintiff,
vs.
THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY, Defendant.

And now comes the attorney general of the State of South Carolina and suggests to the court and gives it to understand and be informed (appearing only for the purpose of this motion) that
29 the State of South Carolina is not a party to this action and declines to become a party or to submit herself in any way to the jurisdiction of her own court.

And the said attorney general doth further suggest and bring to the attention of this honorable court that the defendant aforesaid is in possession of the strip of land described in the complaint by lease or license from the State of South Carolina, under agreement made between said defendant and the board of directors of the South Carolina penitentiary on the twenty-sixth day of May, 1892, herewith exhibited to the court, and approved and ratified by an act of the legislature of said State entitled "An act to ratify and confirm the contract made and entered into by and between the directors of the South Carolina penitentiary and the Columbia Electric Street Railway, Light and Power Company," &c., approved December 24th, 1892; that said strip of land was purchased for the use of said penitentiary on October 18, 1866, from Thomas J. Rawls and confirmed to the uses of said State penitentiary by an act entitled "An act to devote certain public lands to the use of the board of directors of the State penitentiary," approved February 9, 1882; that the power of generating works of the defendant corporation are built upon said strip of land, and are being now used in part in supplying power to said State penitentiary for operating necessary machinery within its walls under the agreement aforesaid.

And the said attorney general doth further suggest and show to this court that if the injunction prayed for in the complaint be granted the defendant will be prevented from carrying out its said agreement with the State of South Carolina, and the said
30 State, without a hearing in the cause, will be deprived of the water power she is entitled to in the manner she has contracted for and of the revenue she has secured, by and under the said agreement, for the period of thirty years.

Wherefore, without submitting the rights of the government of the State of South Carolina to the jurisdiction of the court, but respectfully insisting that the court has no jurisdiction of the subject

in controversy, he asks that the said complaint be set aside and all other proceedings in the case stayed and dismissed.

D. A. TOWNSEND,
Attorney General, South Carolina,
Per BUCHANAN.

Articles of Agreement.

Articles of agreement made and entered into by and between William Jasper Talbert, superintendent of the South Carolina penitentiary, on behalf of the board of directors of the South Carolina penitentiary, party of the first part, and the Columbia Electric Street Railway, Light and Power Company, party of the second part, witnesseth:

Whereas, at a regular meeting of the board of directors of the South Carolina penitentiary, held in the city of Columbia on the 17th day of May A. D. 1892, the following resolution was unanimously adopted, to wit:

"Whereas, under the acts of General Assembly providing for the transfer of the Columbia canal to the board of trustees and authorizing the sale thereof by said board of trustees, there was reserved for the State of South Carolina for the use of the South Carolina penitentiary, 500 horse-power on the line of said canal; and whereas to utilize said water power and make the same available for
31 the purposes of the penitentiary, it would require the expenditure of a large sum of money, which has not been provided for; and

"Whereas, the Columbia Electric Street Railway, Light and Power Company, in consideration of the privileges, uses and enjoyments hereinafter expressed, has offered to develope the same for the penitentiary, and the said proposition is deemed greatly to the advantage of the State of South Carolina, and also of the penitentiary; now, therefore, be it

"Resolved, by the board of directors of the South Carolina penitentiary, That the superintendent of the penitentiary, on behalf of this board, be, and he is hereby, authorized, empowered, and instructed to enter into a contract with the said Columbia Electric Street Railway, Light and Power Company, for the development of the said water power, upon the following terms, that is to say: The Columbia Electric Street Railway, Light and Power Company shall proceed to erect, so as to complete suitable waterways, water gates, and buildings, and to place suitable w-eels therein, within one year from the time of the signing of the cont-act, to utilize the entire amount of 500 horse-power of water power, and, for that purpose, all of the right, title, and interest of the State of South Carolina in and to the lands of the west side of the Columbia canal *is* to be rented to the said company for the term of thirty years from the time of the signing of contract and the said company is to be allowed to make use of the stone-work and stone and other material now upon said lands, provided none of such material be removed from the State property. That, in consideration of the work so to be done,

and the machinery and other property so to be furnished by the said The Columbia Electric Street Railway, Light and Power
32 Company, the said company is to be allowed free and uninterrupted use of all of said water power not required at any time for the use of the penitentiary; the amount reserved for the use of the penitentiary not at any time to exceed 100 horse-power, transmitted by the said company across the canal within the walls of the penitentiary. The said The Columbia Electric Street Railway, Light and Power Company is to pay to the board of directors of the South Carolina penitentiary the sum of $2,500 per annum for each and every year during the continuation of this contarct, commencing when the work aforesaid shall have been completed so as to be ready for the utilization of said water power, less a deduction of $5 per horse-power for each and every horse-power so reserved and used by the penitentiary as afo-esaid; payment to be made monthly, the contract to continue in force for the period of thirty years from the time of the signing of the contract, and at the expiration of such time, within six months after such expiration, the said company, if no agreement mutually satisfactory is entered into for the extension of this contract, is to have the privilege of removing all of its water wheels and other machinery, leaving the said penitentiary the use of the said 500 horse-power of water power, together with the works and buildings erected and gates."

And whereas, the Columbia Electric Street Railway, Light and Power Company has agreed to become a party to the said contract, for the purpose of developing the said water power.

Now, therefore, know all men by these presents:

First. That the said The Columbia Electric Street Railway, Light and Power Company, party of the second part, in considera-
33 tion of the premises, and in consideration of the rights, privileges, and immunities hereinafter set forth, covenants and agrees, at its own cost and expense, to build, erect, and complete on the western bank of the Columbia canal, opposite the South Carolina penitentiary, at or near the point where the water wheel of the South Carolina penitentiary formerly stood all necessary bulkheads, waterways, water gates, tail races, mason-work, and buildings, and to erect suitable water wheels thereon of the most modern and improved patterns, of sufficient capacity to utilize and develope the said five hundred horse-power of water power; the said work to be completed and ready for use within twelve months after the execution of this contarct; and the said party of the second part further covenants and agrees, at its own cost and expense, to maintain and operate the said water wheels for the development and utilization of the said five hundred horse-power of water power for and during the continuation of this contarct. And the said party of the second part further covenants and agrees to transmit across the said Columbia canal, to some convenient point within the walls of the said penitentiary, to be indicated by the superintendent thereof, so many horse-power, not to exceed the sum of one hundred horse-power, for the use and benefit of the said South Carolina penitentiary; the said power to be delivered, when required by the party of the first

part, at the point above indicated, from electric generators, or in such other form as the party of the second part may elect. Provided, however, that any inability to operate said water wheels and to develope the said horse-power, by reason of freshets in the river, or casualty to the canal or in any part of the said water
34 wheels, or parts appertaining thereto, will exonerate the party of the second part from the delivery of the power aforesaid to the penitentiary for and during such time as said interruption may continue; and, provided further, that any freshet in the river, or other casualty, which shall operate to diminish only the capacity of said water wheels, shall, to that extent, exonerate the party of the second part from delivering the power aforesaid to the said penitentiary, and in that event the power to be delivered to the said penitentiary shall be diminished in the same proportion as the capacity of the said water wheels has been affected. The power of the party of the second part to be also diminished in like proportion.

Second. That the said party of the first part, on behalf of the board of directors of the South Carolina penitentiary, covenants and agrees to allow to the party of the second part, for the purpose of the development of the said water power, the use and enjoyment of all the right, title, and interest that the State of South Carolina and the board of directors of the South Carolina penitentiary, by reason of the acts of the legislature hereinbefore referred to, have in and to all the land on the west side of the Columbia canal, between the said canal and the river opposite the walls of the said penitentiary, for and during the term of this contract. And as the party of the first part further covenants and agrees with the party of the second part, that the right, title and interest so conveyed is sufficient for the erection of said bulkheads, waterways, water gates, tail races, and buildings; and further agrees to allow to the said party of the second part, to be used in the erection of the said work, all the stone masonry and other material now on
35 the said land, together with the privilege of quarrying and using such other stone, earth, and other material as may be necessary for the erection and proper execution of said work; and the party of the first part further covenants and agrees that the said party of the second part shall have, for and during the continuation of this contract, the free and uninterrupted use and enjoyment of the right of way along the banks of the said canal to and from Gervais street to the works so to be erected. And the party of the first part, in consideration of the covenants and agreements by and on the part of the party of the second part, hereby further covenants and agrees to allow the said party of the second part the free and uninterrupted use of the said 500 horse-power of water power so reserved by the State of South Carolina for the use of the South Carolina penitentiary, saving and excepting the 100 horse-power of water power so reserved for the use of the penitentiary, as hereinbefore stated.

Third. And the said party of the second part, in consideration of the premises, and further in consideration of the use of the said 500

horse-power of water power, hereby covenants and agrees to pay to the said party of the first part the sum of $2,500 per annum for each and every year during the continuation of this contract, commencing when said work shall have been completed and ready for use, less a deduction of $5 per horse-power for each and every horse-power transmitted in the manner and the form aforesaid by the party of the second part for the use of the party of the first part—the said payments to be made in monthly instalments and payable at the end of each and every month.

36 Fourth. And it is mutually agreed by and between the parties hereto that this contract shall continue and be of force for and during the period of thirty years from the date of the execution of the contract; provided, however, that at the expiration of said period this contract may be continued upon such terms as may be mutually agreed upon by and between the parties thereto; and in the event that the said contract be not continued, the said party of the second part shall have the right, within six months after the expiration of said contract to remove the water wheel and all other machinery by the said party of the second part furnished and erected under the terms of this contract, leaving, however, for the use of the said penitentiary all mason-work, bulkheads, waterways, tail races, and buildings which shall have been erected; and provided, further, that should any payments for and on account of the use of the said water power be in arrears and unpaid for a period of six months, then and in that event the said party of the first part, upon one month's notice to the party of the second part, shall have the right to terminate this contract, and the rights of the parties thereto to be fixed as though the contract had terminated by its own limitation as above set forth.

In witness whereof, the party of the first part has caused these presents to be executed in duplicate by William Jasper Talbert, superintendent, and the corporate seal of the South Carolina penitentiary, on behalf of the board of directors of the South Carolina penitentiary; and the party of the second part has caused

37 these presents to be executed in duplicate by J. Q. Marshall, president, and the corporate seal of the said company to be affixed 26th May, 1892.

[SEAL.] W. J. TALBERT,
Sup't S. C. P.

Witness-:
W. W. ADAMS.
J. EUGENE JARNIGAN.

By order board of directors.
[SEAL.] J. Q. MARSHAL, *President.*

(Duly proved.)
Approved.

W. H. ELLERBEE,
Comptroller General.

I approve the form and execution of the foregoing contract.

JOHN L. McLAURIN,
Att'y General of S. C.

* * * * * * *

The assistant attorney general moved that the suggestion, articles of agreement, and deed from Rawls to the State, above mentioned, be filed. He stated that he appeared for the purpose of this motion only, and refused to move that the State be made a party to the action or to consent thereto. The presiding judge ordered that the motion to file be granted.

Mr. Shand, for the defendant, objected to the jurisdiction of the court on the grounds:

1. That the cause could not proceed without the State being made a party.
2. That the State is an indispensable party.
3. That the State cannot be made a party.

* * * * * * *

38 *Decree.*

THE STATE OF SOUTH CAROLINA,
Richland County.

In the Court of Common Pleas.

THE COLUMBIA WATER POWER COMPANY, Plaintiff,
against
THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY, Defendant.

This cause came on to be heard before me at the present term of the court and has been fully argued.

As to the question raised that the court has no jurisdiction because that the State is an indispensable party, this plea is overruled. The court has jurisdiction. The defendant is a lessee of the water power reserved by the State, and the court can construe a contract made between the defendant and the State whereby it is claimed that the rights of the plaintiff have been affected. The door is not shut to plaintiff because of the contract with the State; the State has a right to come in if she so wishes, but she declares that she will not come in, and the cause can be heard without her presence.

As to the Rawls deed, that deed conveys the property to the State; but subsequently the State conveyed the canal property to the plaintiff and thereby conveyed in fee all of the property known as the "canal property," including its banks, as it existed at the time of the conveyance; and at the time of the act of 1887 and of the conveyance made thereunder the canal property covered the land upon which the defendant's works are erected.

39 Plaintiff acquired its rights under the act of 1887. It is not the grantor of anything to the State, but the State has reserved out of its grant five hundred horse-power of water power, and that much the plaintiff did not purchase. The whole question

turns on the reserved right of the State. The defendant holds a lease from the State, and the contract made by the defendant with the board of directors of the State penitentiary, approved and ratified by the State, has given to the defendant all of the rights which the State had in that five hundred horse-power.

In the act of 1887 there is a distinct reservation of an absolute right to the State of 500 horse-power of water power. Call it an easement, or what you will, it is absolute. Now, can the State dispose of it? Unquestionably she can. She can develope it, she can erect the necessary buildings for its utilization, and can utilize it. She may do it in any way she pleases. She may use old wheels or she may use new and improved methods, and may resort to electricity, which is now generally regarded as an improved method of transmitting water power; therefore there is no objection to the electric plant erected by the defendant under its contract with the State.

Now, can the State lease its power and permit the lessee to use it and supply the State at the cost of the lessee? I think it can. The State is not always ready for carrying on such work; therefore she could lease it, and, in this particular case, the State gets or may get 100 horse-power and the lessee the balance. This being a consideration moving to the lessee, the lessee can devote that consideration to its own use; therefore, under the act, the defendant, as lessee of the State, has the unquestionable right to put the electric plant on the banks of the canal of the penitentiary, and to carry out the contract which has been made between it and the State of South Carolina.

Now, has the defendant the supplementary right to put in a steam plant? Prudence and foresight justifies its erection on the banks of a canal along a river where freshets come, and where time is important there might be serious interruption to the industries of the defendant company, and thus of the penitentiary; therefore the defendant has a right to use so much steam plant as is necessary to supplement its water power at such times as the water power is unavailable by reason of freshets or necessary repairs to the canal or other causes. The dam may break, rains may swell the river, and there might be a long interruption to the use of the water power, and it would be necessary to resort to the steam plant to carry on the work. It is common to use steam as an adjunct to water-power plants. The defendant cannot erect any more steam plant than is necessary to its work as a supplement to the water power which it has received from the State.

I therefore hold that there has been no violation of the State's contract with the plaintiff. That reservation of the State's water power is a part of the contract made with the plaintiff, and that reservation is absolute; therefore I hold that the complaint must be dismissed.

It is therefore ordered and adjudged that the complaint be dismissed.

J. H. HUDSON,
Presiding Judge.

November 11, 1893.

41 On the 21st day of November, 1893, and within ten days after the rising of the court, the plaintiff served the defendant with the following:

Notice of Intention to Appeal.

STATE OF SOUTH CAROLINA, }
Richland County. }

In the Court of Common Pleas.

THE COLUMBIA WATER POWER COMPANY, Plaintiff,
vs.
THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY, Defendant.

To Messrs. John T. Sloan, Jr., Lyles & Muller, and R. W. Shand, defendant's attorneys:

The plaintiff gives notice of its intention to appeal to the supreme court of the said State from so much of the decree of his honor J. H. Hudson herein dated and filed November 11th, 1893:

1. As holds that the defendant is a lessee of the water power reserved.

2. As holds that there is any valid contract between the State and the defendant.

3. And from all the portion of the decree commencing with and inclusive of the sentence, "Plaintiff acquired its rights under the act of 1887," and ending with and inclusive of the sentence, "Therefore I hold that the complaint must be dismissed."

4. And from his honor's ordering and adjudging that the complaint be dismissed.

ABNEY & THOMAS,
BACHMAN & YOUMANS,
Plaintiff's Attorneys.

November 21st, 1893.

42 And on the 21st day of November, 1893, the defendant served the following notice and exceptions upon the plaintiff:

THE STATE OF SOUTH CAROLINA, }
Richland County. }

In the Court of Common Pleas.

THE COLUMBIA WATER POWER COMPANY, Plaintiff,
against
THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY, Defendant.

To Messrs. Abney & Thomas and Messrs. Bachnam & Youmans, plaintiff's attorneys:

You will please take notice that the defendant excepts to the decree of his honor J. H. Hudson, circuit judge, filed in said cause

and dated the 11th day of November, 1893, upon the grounds stated below, and will urge the errors of his honor in these particulars upon any appeal to the supreme court from the degree therein as additional reasons why the order of the court dismissing the complaint should be sustained, to wit:

1. Because he held that the State of South Carolina was not an indispensable party to said cause, and that the court could proceed to judgment therein without the presence of the State as a party to said cause.

2. Because he held that the plaintiff was seized in fee of the land upon which the works were erected by defendant.

JOHN T. SLOAN, JR.,
R. W. SHAND,
LYLES & MULLER,
Defendant's Attorneys.

Columbia, S. C., November 21st, 1893.

43 In pursuance of said notice of appeal by plaintiff, the plaintiff makes and serves the following exceptions for the purpose of said appeal to the supreme court:

Exceptions.

Excepts because his honor the presiding judge erred in holding:

1. That there is a valid lease of the water power reserved by the State.

2. That a valid contract was made between the defendant and the State.

3. That all of plaintiff's rights were acquired under the act of 1887.

4. That defendant is the lessee of a valid lease from the State.

5. That the contract made by defendant with the board of directors of the State penitentiary, approved and ratified by the General Assembly, has given to the defendant all of the rights which the State had in the five hundred horse-power of water power.

6. That in the act of 1887 there is a distinct reservation to the State of a right of five hundred horse-power of water power—"call it an easement or what you will"—absolute in the sense and with the force and effect in which that term is apprehended in the decision.

7. That the State can dispose of its right to the five hundred horse-power of water power in any way the State pleases.

8. That there is no objection to the electric plant erected by the defendant, and the reasons given for this conclusion.

44 9. That the State can lease its power and permit the lessee to use it and supply the State at the cost of the lessee, and the reasons given for this conclusion.

10. That the lessee can devote what is styled the consideration moving to the lessee, to wit, the balance of the horse-power after what of it the State gets to its own use, and the conclusion drawn

therefrom that the defendant as lessee of the State has the unquestionable right to put the electric plant on the banks of the canal at the penitentiary and to carry out the contract which has been made between it and the State as if it were a valid contract.

11. That the defendant has a supplementary right to put in a steam plant on the plaintiff's canal property.

12. That defendant has a right to erect on plaintiff's canal property and use so much steam plant as is necessary to supplement defendant's water power at such times as the water power is for any cause unavailable, and the reasons given for this conclusion.

13. That there has been no violation of the State's contract with the plaintiff.

14. That it is a part of the contract of the State with plaintiff that the reservation of the State's water power is absolute in the sense and with the force and effect in which that term is apprehended in the decision.

15. That the complaint must be dismissed.

16. That his honor erred in ordering and adjudging that the complaint be dismissed.

Excepts because his honor did not decide—

45 17. In clear and distinct terms, that the plaintiff is the owner in fee of all that strip of land lying between the southern line of Plain street on the south and the southern line of Blanding street on the north and between the eastern bank of the Columbia canal and the Congaree river, including the bank of said river, as portion of its canal property.

18. That the plaintiff has the sole and exclusive right, franchise, and privilege to sell and lease water power developed by the Columbia canal.

19. That the plaintiff on and from the — day of March, 1892, was and ever since has been and is ready to furnish to the State the 500 horse-power of water power in accordance with A. A., December, 24th, 1887, and that the State and the board of directors of the South Carolina penitentiary have been since the said — day of March, 1887, informed of and aware of the same.

20. The matters alleged in paragraph 10 of the complaint as there alleged, page 9, fol. 33.

21. That the A. A., December 24th, 1892, mentioned in the sixth paragraph of the complaint, is in violation of section 10, article 1, Constitution of the United States, declaring that no State shall pass any law impairing the obligation of contracts, in this, that it impairs the contract made by the State in A. A., December 24th, 1887, as to the rights, franchises, and privileges of the owners of the property known as the Columbia canal and the lands held therewith as owners in fee thereof, and more especially as to the sole and exclusive right, franchise, and privilege to sell and lease the water power developed by said canal.

46 22. That the defendant should be confined at most to such plant and work as were constructed and done in accordance with the specifications and plans submitted by defendant to and approved by plaintiff.

23. That the erection of the steam plant and the entire machinery thereof by defendant was in utter violation of the property rights of plaintiff.

24. The matter alleged in paragraph 15 of the complaint as there alleged, page 14, fol. 55.

25. That the 500 horse-power of water power to which the State is entitled under A. A., December 24th, 1887, belongs to the State, as State, for the use of the South Carolina penitentiary for State public purposes exclusively, is attached to and not severable from the State, as State, for the use of the penitentiary, and to be used for said purposes and said purposes only.

26. That all claims based on any severance or attempted severance of the right to said 500 horse-power of water power from the State for the use of the penitentiary for said purposes by the person in whose favor said severance is made or attempted to be made are invalid in law.

27. That the canal property on said severance being made or attempted to be made is, as matter of law, released from the servitude or easement imposed on it as the servient tenement by the A. A. of December 24th, 1887, or otherwise.

47 28. That the plaintiff has complied with all the obligations in the premises to which it was subjected by the A. A. of December 24th, 1887, or otherwise.

29. That his honor erred in not granting a perpetual injunction restraining defendant from using or attempting to use the 500 horse-power of water power for the purposes of generating power to apply to the movements of its cars upon the street railway, for lighting its lamps or furnishing power motors, or any other private purpose.

30. In not granting an injunction to enjoin and restrain defendant from entering upon and erecting on the lands or property of plaintiff any structures, buildings, works, or machinery save as is in accordance with the plans and specifications submitted by defendant and approved by plaintiff.

31. In not requiring defendant to remove from the lands and property of plaintiff all of defendant's structures covering the steam-engine, boilers and coal, and its steam-engine and all machinery and property connected therewith.

32. In not ordering an assessment of the damages done by defendant to plaintiff in the premises and adjudging plaintiff's right to have said damages.

33. In not retaining the complaint.

ABNEY & THOMAS,
BACHMAN & YOUMANS,
Attorneys for Appellant.

December 21, 1893.

48 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, Richland County.

THE COLUMBIA WATER POWER COMPANY, Plaintiff, Appellant,
against
THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY, Defendant, Respondent.

Opinion.

EUGENE B. GARY, *A. J.:*

The view which the court takes of this case renders it unnecessary to trace the history of the Columbia canal prior to the year 1887, when the act was passed entitled "An act to incorporate the board of trustees of the Columbia canal, to transfer to the said board the Columbia canal, with the lands now held therewith, and its appurtenances, and to develope the same," the first and seventh sections of which are as follows:

SECTION 1. "That the board of directors of the South Carolina penitentiary are hereby authorized, empowered, and required to transfer, assign, & release to the board of trustees of the Columbia canal, hereinafter created and provided for, the property known as the Columbia canal, together with the lands now held therewith, acquired under the acts of the General Assembly of this State with reference thereto or otherwise, all and singular the rights, members and appurtenances thereto belonging, and upon such transfer,
49 assignment and release, all the right, title and interest of the State of South Carolina in and to said Columbia canal and the lands now held therewith from its source at Bull's sluice through its whole length to the point where it empties into the Congaree river, together with all the appurtenances thereto belonging, shall vest in the said board of trustees for the use & benefit of the city of Columbia, for the purposes hereinafter in this act mentioned, subject, nevertheless, to the performance of the conditions & limitations prescribed on the part of the said board of trustees and thier assigns." * * *

SECTION 7. "That the board of trustees shall, within two years from the ratification of this act, complete the said canal so as to carry a body of water, * * * and furnish to the State, free of charge, on the line of the canal 500 horse-power of water power, to Sullivan Tenner or assigns 500 horse-power of water power, under his contract with the canal commission and to furnish the city of Columbia 500 horse-power of water power at any point between the source of the canal & Gervais street the city may select; and shall, as soon as practicable, complete the canal down to the Congaree river a few yards above the mouth of Rocky branch: Provided, that the right of the State to the free use of the 500 horse-power shall be absolute, and any mortgage, assignment, or transfer of the said canal by the said board of trustees, or their assigns shall always be subject to this right."

In pursuance of said act the board of directors of the South Carolina State penitentiary on the first day of February, 1888,
50 did transfer, assign, and release unto the said board of trustees of the Columbia canal, their successors and assigns, all the right, title, and interest of the State of South Carolina in and to the said Columbia canal and all the lands held therewith in the terms and words of said act and upon the conditions therein stated.

The board of trustees of the Columbia canal thereupon took possession of the canal and the property connected therewith.

At the time of the passage of the act of 1887 the State, through the directors of the penitentiary, was in possession of the property which included the strip of land upon which the water-power plant & steam plant were erected.

In 1890 an act was passed which authorized the board of trustees of the Columbia canal to sell said property subject to all the duties & liabilities imposed by the act of 1887.

The plaintiff holds under a deed made by the board of trustees of the Columbia canal under the above-mentioned act.

On the 26th day of May, 1892, the State, through the directors of the penitentiary, and the defendant entered into a contract by which the State agreed to allow the defendant the free & uninterrupted use of the said 500 horse-power of water power reserved by the State for the use of the penitentiary, saving and excepting the 100 horse-power of water power reserved to the penitentiary, as stated in said contract.

For the use of said 500 horse-power of water power the
51 subdefendant covenanted and agreed to pay to the State $2,500.00 per annum for the time therein specified.

In 1892 this contract was ratified by the legislature by an act entitled "An act to ratify and confirm the contract made and entered into by & between the board of directors of the South Carolina penitentiary and the Columbia Electric Street Railway, Light and Power Company for the developement of the 500 horse-power of water power reserved by the State of South Carolina for the use of the South Carolina penitentiary along the line of the Columbia canal."

The case came on for a hearing before his honor J. H. Hudson, presiding judge, at the October (1893) term of court for Richland county.

Upon the pleadings being read O. W. Buchanan, Esq., assistant attorney general of South Carolina, read the suggestion, which will be incorporated in the report of the case, signed by D. A. Townsend Esq., attorney general of South Carolina; articles of agreement between W. J. Talbert, superintendent of the South Carolina penitentiary, and the defendant, dated 26th May, 1892; deed of conveyance of realty from T. J. Rawls to the State of South Carolina, dated October 18th, 1866; and he further read A. A., Sept. 21st, 1866, 13 Stat., 366; A. A., Feb'y 9th, 1882, 17 Stat., 873, and A. A., Dec. 24th, 1892, 21 Stat., 94.

The assistant attorney general moved that the suggestion, articles of agreement, and deed from Rawls to the State above mentioned be filed. He stated that he appeared for the purpose of the motion

only and refused to move that the State be made a party to the action or to consent thereto.

52 The presiding judge ordered that the motion to file be granted.

Defendant's attorneys then objected to the jurisdiction of the court on the grounds:

1. That the cause could not proceed without the State being made a party.

2. That the State is an indispensable party.

3. That the State cannot be made a party.

The presiding judge stated that he would hear further argument on the question of jurisdiction after the testimony was heard, in the general argument of the case, and ordered that the testimony be proceeded with. After the testimony was closed & argument heard by the presiding judge he rendered his decree, which, along with plaintiff's exceptions thereto, will be set forth in the report of the case.

The defendant, in accordance with the proper practice, gave notice that it would endeavor to support the judgment of the court below upon the two additional grounds:

"1st. Because he held that the State of South Carolina was not an indispensable party to said cause, and that the court could proceed to judgment therein without the presence of the State as a party to said cause."

"2nd. Because he held that the State was seized in fee of the land upon which the works were erected by the defendant."

The complaint alleges two causes of action, one for injunction, on the equity side of the court, the other alleging title in the plaintiff and claiming damages for alleged injuries by reason of the unlawful entry upon its land and the erection of a steam plant

53 in connection with the water-power plant.

Heyward *v.* Farmers' Mining Co., 19 S. E. R., 963:

In the consideration of this case it must be borne in mind that there is a difference where the action is in effect a suit against the State and where the State is an indispensable party.

This distinction is mentioned in the case of *In re* Ayers, 123 U. S., at page 500, where it is said: "But the very ground on which it is adjudged not to be a suit against the State and not to be one in which the State was a necessary party was that the defendants personally & individually were wrong-doers against whom the complainants had a clear right of action for the recovery of the property taken, or its value, and that therefore it was a case in which no other parties were necessary."

Section 143 of the Code shows who are indispensable parties. It provides that "the court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others; but when a complete determination of the controversy cannot be had without the presence of other parties the court must cause them to be brought in."

In Foster's Federal Practice it is shown that a different rule pre-

vails as to parties in equitable actions and those on the law side of the court. That author, in section 37, p. 76, says: "In actions at law * * * where an individual is sued as for injuries to persons or property, real or personal, * * * the Government does not stand behind him to defend him. If he has the authority
54 of law to sustain him in what he has done, like any other defendant, he must show it to the court and abide the result. In either case the State is not bound by the judgment of the court, and generally its rights remain unaffected.

It is no answer for the defendant to say, I am an officer of the Government and acted under authority, unless he shows the sufficiency of that authority.

Courts of equity proceed upon different principles as to parties.

In accordance with these views, it was held in the case from which the foregoing extracts are taken that a suit by a bondholder against the officers of a State and a railroad company whose bonds he held to have a sale of mortgaged property to the governor of Georgia, claiming to act in his individual capacity, declared void upon the ground that the governor was not authorized to bid in said property for the State, and the State had no constitutional power to make the purchase, could not be *mentioned*."

One of the objects of the plaintiff's action herein is to have declared null and void the contract between the State and the defendant as to the 500 horse-power of water power on the ground that the State could not lease the same.

The case of Cunningham *vs.* Mason & Brunswick R. R. Co., 109 U. S., 446, shows that the State is an indispensable party, and if she refuses to become a party the action will be dismissed for
55 want of jurisdiction. In that case the court says: "This principle is conceded in all the cases, and whenever it can be clearly seen that the State is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction." Again, "As was said in Barney *vs.* Baltimore, 6 Wall., 280, there are *presons* who are merely formal parties without real interest, and there are those who have an interest in the suit, but which will not be injured by the relief sought, and there are those whose interest in the subject-matter of the suit renders them indispensable as parties to it. Of this latter class the court said in the case of Shields *vs.* Barrow, 17 How., 130: 'They are persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without affecting that interest or leaving the controversy in such a condition that its final disposition may be wholly inconsistent with equity and good conscience.' 'In such cases,' says the court in Barney *vs.* Baltimore, 6 Wall., 280, 'the court will refuse to entertain the suit when these parties cannot be subjected to its jurisdiction.'"

The complaint and the suggestion filed by the attorney general show that the State has interests which would be affected by granting the relief prayed for in the complaint. To grant such relief would have the effect of cloggong the wheels of one of the branches of the State government, to wit, its penitentiary.

In the case of Hagood *vs.* Southern, 117 U. S., at p. 71, the court says: "The defendants in the present case, through officers of the State, are not authorized to enter its appearance to the suits
56 and defend for it in its name. The complainants are not entitled to compel its appearance, for the State cannot be sued without its consent; and the court cannot proceed to the determination of a cas*ue* and controversy to which the State is an indispensable party without its presence. * * * The suggestion that it has had the opportunity and invitation to appear is immaterial, for it has a constitutional right to insist on its immunity from suit."

It clearly appears that the State is an indispensable party.

It is urged, however, that the objection is not properly interposed. This objection is jurisdictional in its nature, and in the case of Lowry *vs.* Thompson, 25 S. C., 419, the supreme court, of its own motion, raised such objection, which was sustained.

The State being an indispensable party, and refusing to become a party, the cause of action on the equity side of the court cannot be sustained.

We come now to a consideration of the cause of action on the law side of the court.

The first question to be disposed of is whether or not the State is an indispensable party to this action.

In the case of Lowry *vs.* Thompson, 25 S. C., 416, Chief Justice McIver, speaking for the court in an exceedingly clear opinion, says: "It will be necessary, first, to dispose of the question of jurisdiction, for — it shall be determined that the court has no jurisdiction, then it would be not only unnecessary but improper to undertake to decide any of the other questions in the case.

57 That a State cannot be sued in any of its courts without its express consent is a proposition so universally conceded as to render any argument or authority to support it wholly unnecessary. If, however, authority should be asked for, it will be found in almost every case which will be hereinafter cited, where it will be found that the proposition has either been distinctly decided or expressly recognized, and we are not aware of any authority to the contrary.

As it is not pretended that any such consent was given in this case, the first inquiry is whether this is really an action against the State. The fact that the State is not named as a party to the record is not conclusive of this inquiry, though at one time it seems to have been so held in the case of Osborn *vs.* United States Bank, 9 Wheat., 738, followed by Davis *vs.* Gray, 16 Wall., 203; but these cases, so far as this particular point is concerned, are entirely inconsistent with the more recent decisions of the Supreme Court of the United States, where the rule seems to be now well settled that an action, though in form against an officer of a State, if it is in fact a suit against the State itself, cannot be maintained even though the State is not made a party on the record.

Louisiana *vs.* Jumel, 107 U. S., 711.

Cunningham *vs.* Macon & Brunswick R. R. Co., 109 *id.*, 440.

Hagood *vs.* Southern, 117 *id.*, 52.

* * * In Cunningham *vs.* Macon & Brunswick R. R. Co., *supra*, Mr. Justice Miller reviews this whole subject, and admits that it is not an easy matter to reconcile the various decisions of the
58 Supreme Court of the United States upon the subject, and, while disavowing any attempt to do so, he proceeds to deduce from them certain general principles. * * *

"1. It has been held in a class of cases where property of the State or property in which the State has an interest comes before the court and under its control in the regular course of judicial administration without being forcibly taken from the possession of the Government, the court will proceed to discharge its duty in regard to that property; and the State, if it chooses to come in as a plaintiff, as in prize cases, or to intervene in other cases when she may have a lien or other claim on the property, will be permitted to do so, but subject to the rule that her rights will receive the same consideration as any other party interested in the matter, and be subjected in like manner to the judgment of the court.

Of this class are the cases of The Siren, 7 Wall., 152, 157; The Davis, 10 *id.*, 15, 20, and Clark *vs.* Barnard, 108 U. S., 436. * * *

"2. Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property to which his defense is that he has acted under the orders of the Government.

In these cases he is not sued as or because he is the officer of the Government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officers.

To make out his defense he must show that his authority was sufficient in law to protect him. The somewhat famous case of United States *vs.* Lee, 106 U. S., 196, is cited as belonging
59 to this class, and to it we may add the subsequent case of Poindexter *vs.* Greenhaw, 114 U. S., 270.

"3. A third class, which has given rise to more controversy, is where the law has imposed upon an officer of the Government a well-defined duty in regard to a specific matter, not affecting the general powers or functions of the Government, but in the performance of which one or more individuals have a distinct interest capable of enforcement by judicial process."

The defendant is sued for damages growing out of alleged injuries to plaintiff's property, and the case falls within the rule laid down under the second head, *supra*, and therefore the State is not an indispensable party.

This conclusion is in harmony with the principles enunciated in the case of Pennoyer *vs.* McConnaught, 140 U. S., 1, in which the leading authorities on this subject are referred to.

Having reached the conclusion that the State is not an indispensable party in determining this cause of action, the next question for consideration is whether or not the contract between the State and the defendant relative to the 500 horse-power of water power is null and void.

This contract received legislative construction when it was ratified by the act of the legislature hereinbefore mentioned, and al-

though such construction is not binding on this court, still it shows the intention of the State when it reserved the 500 horse-power of water power.

60 We think the construction placed upon said contract in 1892 by the legislature as to the 500 horse-power reserved to the State was in harmony with the terms of said contract, the proviso to section 7 of the act of 1887 being that the right of the State to the free use of the said 500 horse-power should be absolute.

The use of the word "absolute" was for the purpose of creating a right in the State to this 500 horse-power separable and distinct from the ownership in other lands and not dependant upon any particular lands to which it may be appurtenant.

This reservation was a right of *profit à prendre.* Campell, C. J., in delivering the opinion of the court in Hall *vs.* City of Ionia *et al.*, 38 Mich., 423, says: "There is no foundation for the claim that a right to the perpetual use of water must be dependant upon a particular estate with which it is connected. Some confusion has, perhaps, been caused by an attempt among writers to create symmetry in the law by putting all rights connected with land or springing from them into classes, and by speaking of these particular rights as easements, which very commonly requires both a dominant & servient estate.

But every right of property must usually have some peculiar qualities of its own, which must not be destroyed by inappropriate attempts to classify it with different kinds. The old maxim *ommis definitio periculosa* is especially true when things of essentially different qualities are placed together under one head.

The value of water as a distinct inheritance, either for creating power or for other purposes of use or consumption, has been recognized in all periods, and its ownership is well established as

61 not dependent on lands to which it may be appurtenant, but as having a separate and intrinsic importance.

There may be an occasional dictum and possibly some decisions to the contrary; but most cases where any doubt seems raised on this question will be found to rest on peculiar facts which in no way involved the general doctrine. The facts are often such as to confine the use of water not only to special places, but also to specified purposes; but this limited use is the exception and not the rule," citing a *mu*nber of authorities. Proceeding, he says: "Experience has shown that in many instances the right to use and dispose of water may not only be more valuable than any land which is occup*u*ed for its gathering & disposal, but it is also of special value to be taken to a distance and parcelled out among several users or occupants. Water works are only made available by the sale of water to consumers, and valuable water power is frequently distributed among several mills in large & small quantities and may not be used by the owner at all.

The ownership of it cannot be confined to the right in the nature of a license, and is as well recognized a title or interest of a real nature as land itself, without some use of which it could not be made available."

Foster, J., in speaking for the court in Goodrich *vs.* Burbank, 12 Allen, 459, uses this language: "The water itself may not be the subject of property, but the right to take it and to have pipes laid in the soil of another for that purpose and to enter upon the land of another to lay, repair, and renew such pipes is an interest
62 in the realty assignable, descendible, and divisable." On this subject the language of Judge Curtis is as follows: "I know of no rule of the common law which prohibits grants of the incorporeal right to divert water from being made in gross. If I have a spring, I may sell the right to take water from it by pipes to one who does not own the land across which the pipes are to be carried, and I may either restrict the use to a particular house or not, as I please. It is true the grantee cannot make the grant useful without acquiring from the owner of the intermediate land the right to lay pipes therein, nor can he use the water in a house until he obtains the right to possess that house; but these may be acquired afterwards.

[Illegible.]

capable. Incorporeal rights may be inseparably annexed to a particular messuage or tract of land by the grant which creates them and makes them incapable of separate existence, but they may also be granted in gross, and afterwards, for purposes of enjoyment, be annexed to a messuage or land and again severed therefrom by a conveyance of the messuage or land without the right or a conveyance of the right without the lands."

Lonsdale Co. *vs.* Moies, 21 Law Rep., 664: * * * "We are unable to distinguish between the right to take water by a canal from a pond for the purposes of power and the right to take it from a spring in a pipe for domestic purposes, the watering of cattle, or to supply an artificial jet or fountain, and to sell it to any others for any uses they may desire to make of it."

The following authorities will also throw light upon the subject:

63 Tinicum Fishing Co. *vs.* Carter, 61 Penn. St., 39.
19 Am. & Eng. Enc. of Law, p. 259.
Gould on Waters, section 299, p. 562.
Poull *vs.* Mockley, 33 Wis., 482.
Washburn's Easements & Servitudes, section 12 & 17*a*.
Angell on Water-courses, section 143.

We are of opinion that the contract between the State and the defendant was not null and void.

It is contended that said contract did not confer upon the defendant the right to erect the steam plant. This depended upon the fact whether it was merely incidental to and essential to the enjoyment of the use of the water-power plant.

The parties to the action had the right of trial by jury as to the legal issues raised by the pleadings, but neither a demand was made therefor on circuit nor was there an exception raising such question.

This court must assume that the circuit judge properly decided

all questions of fact upon which his judgment had necessarily to rest.

Even if there was error on his part in his findings of fact, it is not the subject of review by this court in a law case.

This court, therefore, cannot review the testimony for the purpose of determining whether or not the steam plant was merely incidental to the water-power plant and essential to the enjoyment of its use.

64 For the same reason we cannot review his honor's finding of fact in effect that the plaintiff is owner in fee of the land described in the complaint, subject to the right of the State to the 500 horse-power of water power.

These views render it unnecessary to decide specifically the other exceptions herein.

It is the judgment of this court that, for the reasons herein set forth, the judgment of the circuit court be affirmed.

I concur in the result, as I am not satisfied that plaintiff ever acquired a title to the land upon which the works in question have been erected, for this does not depend solely upon the solution of a question of fact, as seems to be supposed.

HENRY McIVER, *C. J.*

I concur in the result.

Y. J. POPE, *A. J.*

[Endorsed:] 3517. South Carolina supreme court, Richland county. The Columbia Water Power Company, pl'ff, app'l't, *vs.* The Columbia Electric, &c., Company, def't, resp'd't. Opinion. Eugene B. Gary, A. J. I concur in the result, as I am not satisfied that plaintiff ever acquired a title to the land upon which the works in question have been erected, for this does not depend solely upon the solution of a question of fact, as seems to be supposed. Henry McIver, C. J. I concur in the result. Y. J. Pope, A. J. (Report.) Supreme court of South Carolina, clerk's office, Columbia, S. C. Filed 18 Feb., 1895. U. R. Brooks, clerk.

65 Know all men by these presents that we, Charles K. Oliver and F. M. Rivers, are held and firmly bound unto the Co. lumbia Electric Street Railway, Light & Power Company in the full and just sum of ($500) five hundred dollars, to be paid to the said The Columbia Electric Street Railway, Light & Power Company, its certain attorney or assign; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 9th day of February, A. D. 1897.

Whereas lately, at a session of the supreme court of the State of South Carolina, in a suit depending in said court between The Columbia Water Power Company, plaintiff, appellant, and The Columbia Electric Street Railway, Light and Power Company, defendant, respondent, a judgment was rendered against the said The Columbia

Water Power Company, and the said The Columbia Water Power Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said The Columbia Electric Street Railway, Light & Power Company, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof: Now, the condition of the above obligation is such that if the said The Columbia Water Power Company shall prosecute said writ of error to effect and answer all costs if it shall fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

CHARLES K. OLIVER. [SEAL.]
F. M. RIVERS. [SEAL.]

Signed, sealed, and delivered in presence of—
G. M. THOMPSON.

66 THE STATE OF SOUTH CAROLINA,
County of Richland.

Personally appeared before me G. M. Thompson and made oath that he saw the within-named Charles K. Oliver and F. M. Rivers sign, seal, and as their act and deed deliver the within-written bond.

G. M. THOMPSON.

Sworn to and subscribed before me this 9th day of February, A. D. 1897.

F. W. McMASTER,
Notary Public. [SEAL.]

THE STATE OF SOUTH CAROLINA,
County of Richland.

Personally appeared before me Charles K. Oliver and F. M. Rivers and severally swear each *and* of and for himself that he is worth the sum of five hundred dollars over all his debts and liabilities and exclusive of property exempt by law from execution.

CHARLES K. OLIVER.
F. M. RIVERS.

Sworn to and subscribed before me this 9th day of February, A. D. 1897.

F. W. McMASTER,
Notary Public. [SEAL.]

Approved:
HENRY McIVER,
Chief Justice of the Supreme Court of the State of South Carolina.

February 9th, 1897.

67 UNITED STATES OF AMERICA, *ss:*

To the Columbia Electric Street Railway, Light and Power Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of South Carolina, wherein The Columbia Water Power Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry McIver, chief justice of the supreme court of the State of South Carolina, this ninth day of February, in the year of our Lord one thousand eight hundred and ninety-seven.

HENRY McIVER,
Chief Justice of the Supreme Court of the State of South Carolina.

68 [Endorsed:] The Columbia Water Power Company, plaintiff in error, against The Columbia Electric Street Railway, Light and Power Company, defendant in error. Citation in error. Supreme court of South Carolina, clerk's office, Columbia, S. C. Filed 9 Feb., 1897, with copy. U. R. Brooks, clerk.

Service of the within citation acknowledged February 9, 1897.
WM. H. LYLES,
Def't's Att'y.

69 THE COLUMBIA WATER POWER COMPANY, Plaintiff in Error,
against
THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY, Defendant in Error.

The plaintiff in this action makes the following assignment of errors which it avers occurred in the judgment of the supreme court of the State of South Carolina herein February 18, 1895:

That error was committed in deciding in favor of the validity of the contract between the defendant and the board of directors of the South Carolina penitentiary May 26, 1892, and the act of the General Assembly of the State of South Carolina December 24, 1892, ratifying and confirming the same, which were drawn in question on the ground of their being repugnant to the Constitution of the United States of America, in this, that they impaired the obligation of the contract made by the State of South Carolina Decem-
70 ber 24, 1897, as to the rights, franchises, and privileges of plaintiff as owner in fee of the property known as the Columbia canal, and more especially as to the plaintiff's sole and ex-

clusive right, franchise, and privilege to *see* and lease the water power developed by said canal, and as to the five hundred horse-power of water power to be furnished to *to* the said State, and in this, that they deprived the plaintiff of its property without due process of law.

And the plaintiff prays that the said judgment be reversed and altogether held for naught, and that it may be restored to all things which it hath lost by occasion of said judgment.

LE ROY F. YOUMANS,
Att'y for Pl'f in Error.

February 9, 1897.

71 [Endorsed:] The Columbia Water Power Company, pl't'f in error, *v.* The Col'a Electric Street R'lway, Light and Power Co., d'f't in error. Assignment of errors and prayer for reversal. Le Roy F. Youmans, att'y for p'ff in error. Supreme court of South Carolina, clerk's office, Columbia, S. C. Filed 9 Feb., 1897. U. R. Brooks, clerk.

72 THE STATE OF SOUTH CAROLINA, }
Supreme Court. }

I, U. R. Brooks, clerk of the supreme court of the State of South Carolina, do hereby certify that annexed to and returned with this writ of error in the case of The Columbia Water Power Company, plaintiff in error, against The Columbia Electric Street Railway, Light and Power Company, defendant in error, are the foregoing transcript of the record in the said case on file in the said court, which I hereby certify to be a true copy of said record; also the assignment of errors and prayer for reversal and citation to the defendant in error, with acknowledgment of service.

Witness my hand and the seal of the supreme court of the State of South Carolina, at Columbia, this fifth day of March, A. D. 1897.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk of Supreme Court of S. C.

73 [Endorsed:] The Columbia Water Power Company, plaintiff in error, *v.* The Columbia Electric Street Railway, Light and Power Company, defendant in error. Writ of error, transcript of record, citation in error, assignment of errors and prayer for reversal, and certificate.

Endorsed on cover: Case No. 16,508. South Carolina supreme court. Term No., 729. The Columbia Water Power Company, plaintiff in error, *vs.* The Columbia Electric Street Railway, Light and Power Company. Filed March 8th, 1897.